RECEIVED
MAY 20 1977
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76 - 76-6783

ROGER L. STRODES,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT
OF CERTIORARI TO THE
SUPREME COURT OF OHIO

THOMAS J. VESKAUF
First National Bank Building
Springfield, Ohio 45502
and
WILLIAM R. HOLLAND
912 Centran Building
Akron, Ohio 44308
ATTORNEYS FOR PETITIONER

WITH THEM ON THE BRIEF:

THE N.A.A.C.P. LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.
By:
JACK GREENBERG
JAMES M. NABRITT, III
PEGGY C. DAVIS
DAVID E. KENDALL
JOEL BERGER
10 Columbus Circle
New York, New York 10019
ANTHONY G. AMSTERDAM
Stanford University
School of Law
Stanford, California 94305

TABLE OF CASES

	Page
Adams v. United States ex rel McCann, 317 U.S. 269 (1942)	36
Adams v. Washington, 403 U.S. 947 (1971)	51
Aiken v. Washington, 403 U.S. 946 (1971)	51
Anderson v. United States, 326 A. 2d 807 (C.A.D.C., 1974)	30n. 33
Atkinson v. North Carolina, 403 U.S. 948 (1971)	31
Beck v. Washington, 369 U.S. 541 (1963)	44
Bloom v. Illinois, 391 U.S. 194 (1968)	23
Boulden v. Holman, 394 U.S. 478 (1968)	45
Boulden v. Holman, 394 U.S. 478 (1969)	49, 51
Chambers v. Florida, 309 U.S. 277 (1940)	43, 44
Childs v. North Carolina, 403 U.S. 948 (1971)	51
Davis v. Georgia, 97 S. Ct. 399 (1976)	45, 48
Duncan v. Louisiana, 391 U.S. 145 (1968)	23
Estes v. Texas, 381 U.S. 532 (1965)	44
Forsythe v. State, 12 Ohio Misc. 99, 41 Ohio Ops. 2d 104 (C.P. Allen Cty., 1967)	37, 44
Funicello v. New Jersey, 403 U.S. 948 (1911)	31
Funicello v. New Jersey, 403 U.S. 948 (1971)	52
Furman v. Georgia, 408 U.S. 238 (1972)	passim
Gregg v. Georgia, 96 S. Ct. 2909 (1976)	12, 21, 21, 25n. 26, 33
Groppi v. Wisconsin, 400 U.S. 505 (1971)	36, 43
Harris v. Texas, 403 U.S. 947 (1971)	51
In Re Hillery, 79 Cal. Rptr. 773, 457 P.2d 656 (Sup. Ct., 1969)	47
Irvin v. Dowd, 366 U.S. 717 (1961)	44
Jackson v. United States, 221 F. 2d 883 (C.A.D.A., 1955)	30n.33
Jaggers v. Kentucky, 403 U.S. 946 (1971)	51
Ladetto v. Massachusetts, 403 U.S. 947 (1971)	46, 51
Marion v. Beto, 434 F. 2d 29 (C.A. 5, 1970)	23, 49

Table of Cases (Continued)

	Page
Maxwell v. Bishop. 398 U.S. 262 (1969)	45
McElroy v. United States, 361 U.S. 249 (1960)	19n.15, 23
McGautha v. California, 402 U.S. 183 (1971)	19,20, 21n. 23, 22
Mullaney v. Wilbur, 421 U.S. 684 (1975)	12, 28, 29, 32
Proffitt v. Florida, 96 S. Ct. 2960 (1976)	21, 22
Quintrana v. Texas, 403 U.S. 947 (1971)	51
Rainsburger v. Foglaine, 380 F. 2d 783 (C.A. 9, 1967)	31
Roberts v. Louisiana, 428 U.S. 325 (1976)	passim
Segura v. Patterson, 403 U.S. 945 (1971)	46
Segura v. Patterson, 403 U.S. 946 (1971)	52
Sheppard v. Maxwell, 384 U.S. 333 (1966)	36, 37, 43, 44
Snyder v. Massachusetts, 291 U.S. 97 (1934)	23
Speck v. Illionois, 403 U.S. 946 (1971)	51
Speiser v. Randall, 357 U.S. 513 (1958)	32
State v. Bayless, 48 Ohio St. 2d 73 (1976)	16, 35
State v. Bell, 48 Ohio St. 2d 270 (1977)	16n.7, 18n.14
State v. Edwards, 49 Ohio St. 2d 270 (1976)	18n. 14
State v. Fairbanks, 32 Ohio St. 2d 64 (1972)	36, 37, 43, 44
State v. Hines, Ct. of Appeals, Fifth Ohio App. Dist., Case Nos. CA-634-639	18n.14
State v. Laskey, 113 Ohio App. 2d 91, aff'd., 21 Ohio St. 2d 187 (1970)	36
State v. Pruett, 403 U.S. 946 (1971)	52
State v. Royster, 48 Ohio St. 2d 381 (1976)	16n.7, 32
State v. Sheppard, 165 Ohio St. 293 (1956), rev'd., 384 U.S. 333 (1966)	41
State v. Watson, 28 Ohio St. 2d 15 (1971)	47
State v. Wigglesworth, 403 U.S. 947 (1971)	51

Table of Cases (Continued)

	Page
Turner v. Texas, 403 U.S. 947 (1971)	52
United States ex rel Bloeth v. Denno, 313 F. 2d 364 (C.A.2, 1963)	39
United States v. Bolden, 514 F. 2d 1301 (C.A.D.C., 1974)	30n.33
United States v. DeVall, 462 F. 2d 137 (C.A.5, 1972)	30n.34
United States v. Jackson, 390 U.S. 570	23, 31
United States v. Kramer, 289 F. 2d 909 (C.A. 2, 1961)	30
Wansley v. Slayton, 487 F. 2d 90 (C.A. 4, 1973)	36
Williams v. New York, 337 U.S. 241 (1949)	25n.28
Wilson v. Florida, 403 U.S. 947 (1971)	52
Witherspoon v. Illinois, 391 U.S. 510 (1968)	passim
Woodson v. North Carolina, 428 U.S. 280 (1976)	passim
Woodwards v. Maxwell, 303 F. Supp. 690 (S.D. Ohio, (1969)	47

INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	1
Questions Presented	1
Constitutional and Statutory Provisions Involved	2
Statement	6
How the Federal Questions Were Raised and Decided Below	7
Reasons for Granting the Writ	
I. This Court Should Grant Certiorari to Review the Constitutional Validity of Petitioner's Sentence of Death	7
A. Introduction	7
B. The Ohio Death Penalty Statutes Place Unconstitutional Limitations Upon the Consideration of Mitigating Circumstances	8
C. The Ohio Death Penalty Statutes Violate the Sixth, Eighth and Fourteenth Amendments in that they Deny the Capitally Accused the Right to a Judgment of his Peers as to the Existence of Mitigating Circumstances, and the Appropriateness of the Penalty of Death	15
D. Ohio Capital Sentencing Procedures Impermissibly Penalize Exercise of the Right to Trial by Jury	28
E. Ohio Capital Sentencing Procedures Impermissibly Shift to the Defendant Convicted of Aggravated Murder with Specifications the Burden of Proving Facts which Distinguish Those Who May Live and Those Who Must Die	28
II. Petitioner Should Not Be Put to Death Without the Vote of the People of Ohio	31
III. This Court Should Grant Certiorari to Consider Whether the Rights of Petitioner, Who is Black, Under the Sixth and Fourteenth Amendments to the United States Constitution, to a Fair Trial by an Impartial Jury Were Denied by a Venire Selection Process, Violative of Ohio Law, Which Yielded Only One Third of the Percentage of Blacks in His County's General Population, Petitioner Having Demonstrated a Prima Facie Case of Intentional Discrimination Which the State Failed to Rebut by Competent Evidence, or Any at All	32
Conclusion	34

STATUTES

Page

ALA. H.B.
212 §7(g) 14n.3

ALA. H.B.
212 §§(6) (a) and (b) 14n.3

ALA. H.B.
212 §7(b) 14n.3

ALA. H.B.
§7(f) 14n.3

ARIZ. REV. STAT.
§13-454(D) 14n.3

ARIZ. REV. STAT.
§§13-454(1) and (2) 14n.3

ARIZ. REV. STAT.
§13-454(F) (1) 14n.3

ARK. CODE
§47-4712(d) 14n.3

ARK. CODE
§§41-4711(a) and (b) 14n.3

ARK. CODE
§41-4712(a) 14n.3

CAL. PENAL CODE
§190.3 ..... 14n.3

CONN. GEN. STAT.
§53a-45(4)(f) 14n.3

CONN. GEN. STAT.
§53a-45(4)(g)(1) and (2) 14n.3

CONN GEN. STAT.
§53a-45(f)(2) 14n.3

11 DEL. CODE
§§636, 4209(1) 13n.1

FLA. STAT. ANN.
§921.141(7)(b) 14n.3

FLA. STAT. ANN.
§921.141(7)(f) 14n.3

GA. CODE
§27-2531.1(b) 14n.3

GA. CODE
§27-2534.1(b)(1) 14n.3

IDAHO CODE
§§18-4003 and 4004 ..... 13n.1

Statutes Continued

Page

ILL. REV. STAT.
ch. 38, §1005-8-1A..... 14n.3

N.M. STAT. ANN.
§40a-20-2..... 14n.3

N.Y. PENAL LAW
§125.27..... 14n.3

OHIO REV. CODE
§§2929.04(A)(4) and (5)..... passim

OHIO REV. CODE
§2929.04(B)(3)..... passim

OHIO REV. CODE
§2929.04(B)..... passim

OHIO REV. CODE
§2929.03(E)..... passim

OHIO REV. CODE
§2929.03(D)..... passim

OHIO REV. CODE
§2929.04(B)..... passim

OHIO REV. CODE
§2929.04(B)..... passim

OHIO REV. CODE
§2903.03..... passim

OKLA. STAT. TIT.
21, §701.3..... 13n.1

R.I. GEN. LAWS ANN.
§11-23-2..... 13n.1

SEC. (5)(a), Col. S.B. No. 46(1974 sess.)..... 14n.3

SEC. 4(6)(a), Col. S.B. No. 46..... 14n.3

SEC. 4(4)(b), Col. S.B. No. 46..... 14n.3

S.C. CODE
§16-52..... 13n.1

TENN. CODE ANN.
§§39-3702 and 39-2402..... 13n.1

49 U.S.C.
1473(c)(6)(A)..... 14n.3

ILL. REV. STAT.
ch. 38, §1005-8-1A(3)..... 14n.3

IND. ANN. STAT.
§10-3041(b)..... 13n.1

KY. CRIM. CODE
§§5.76(2) and 61(2)..... 13n.1

Statutes Continued

Page

LA. REV. STAT. ANN
§§14:30, 14:113 and 14:44..... 13n.1

MD. CODE ANN. ART.
27§413..... 13n.1

MISS. CODE
§§97-3-65, 97-3-21 and 97-3-19(2)..... 13n.1

MODEL PENAL CODE
§201.6 (Proposed Official Draft, 1962)..... 14n.2

MONT. REV. CODES ANN.
§94-5-105(1)..... 14n.3

MONT. REV. CODES ANN.
§94-5-105(1)(b)..... 14n.3

NASH REV. CODE
9.49.030, Initiative Measure No. 316..... 13n.1

NEB. REV. STAT.
§§29-2523(1)(a) and (2)(a)..... 14n.3

NEB. REV. STAT.
§§92-2523(2)(b) and (c)..... 14n.3

NEB. REV. STAT.
§29-2523(2)(g)..... 14n.3

NEB. REV. STAT.
§29-2523(2)..... 14n.3

N.C. GEN. STAT.
§§14-17 and 14-21..... 13n.1

N.H. REV. STAT. ANN.
§630:1..... 13n.1

N.M. STAT. ANN.
§40A-2-1, 40A-20-2..... 13n.1

49 U.S.C.
§1473(c)(7)(B)(i) and (ii)..... 14n.3

49 U.S.C.
§1473(c)(6)(B)..... 14n.3

UTAH CODE ANN.
§76-5-202 (1)(g)..... 14n.3

UTAH CODE ANN.
§76-3-207(1)(e)..... 14n.3

UTAH CODE ANN.
§76-5-201(1)(a) and (g) and §76-3-207(1)(a)..... 14n.3

VERNON'S MO. STAT. ANN
§§559.009(3) and 559.05..... 13n.1

Statutes Continued

Page

VERNON'S TEX. CODE OF CRIM. PROC.,
Art. 37.071.....23n.29

VA. CODE
§18.2-31..... 13n.1

Other Authorities

Page

BOWERS, EXECUTIONS IN AMERICA
8 (1974) 20n.17

HOGARTH, SENTENCING AS A HUMAN PROCESS
(1971) 22n.24

JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES
§20.04 ..... 27n.34

KALVEN & ZEISEL, THE AMERICAN JURY
437-44 (1966) 22n.24

KOESTLER, REFLECTIONS ON HANGING
(Amer. ed. 1957) at 21-40 24

Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code
23 CLEVE. ST. L. 8, 18 (1974) ..... passim

Michael & Wechsler, A Rationale of the Law of Homicide II,
37 COLUM. L. REV. 1261, 1965 (1937) 27

Powell, Jury Trial of Crimes
23 WASH. & LEE L. REV. 1,5 24

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT
(ST/SOA/SD/9-10) (1968) at 64 24

Zumwatt, The Anarchy of Sentencing in the Federal Courts
(57 J.AM. JUD. SOC. 96 (1973) 22n.24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76 -

ROGER L. STRODES,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered November 24, 1976, rehearing denied December 22, 1976.

CITATIONS TO OPINIONS BELOW

The opinions of the Ohio Supreme Court are reported at 48 Ohio St. 2d 113 (1976) and are attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the imposition of petitioner's death sentence violate the Sixth, Eighth, Tenth, or Fourteenth Amendment to the Constitution of the United States?

2. Were the Sixth and Fourteenth Amendment Rights of petitioner, who is Black, to a fair trial by an impartial jury denied by a venire selection process which yielded only one third of the percentage of Blacks in his county's general population, petitioner having demonstrated a prima facie case of intentional discrimination which the state failed to rebut by competent evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, Tenth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

Ohio Rev. Code Ann. §2903.1 (1974). Aggravated murder.

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. §2929.02 (1974). Penalties for murder.

> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

Ohio Rev. Code Ann. §2929.03 (1974). Imposing sentence for a capital offense.

> (A) If the indictment or count in the indictment charging aggravating murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
>
> (B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of

section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, whether the offender is guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specificiation must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined.

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance

of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life inprisonment on the offender.

Ohio Rev. Code Ann. §2929.04 (1974). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting

to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under stress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio Rev. Code Ann. §2313.08 (1974). Annual jury list.

The jury year in each county shall begin on the first Monday of August of each year, provided the court of common pleas may designate otherwise. A new and complete jury list shall be made up annually by the commissioners of jurors and shall be certified by them and filed in their office before the beginning of each jury year. The said names shall be entered in a suitable book of record, to be known as the "annual jury list," and shall be arranged alphabetically so far as practicable and under convenient divisions by precincts, districts, and townships, and shall be properly indexed. With each name shall be recorded the occupation, place of business, and place of residence, as nearly as the same can be ascertained. A duplicate of said annual jury list shall be certified by the commissioners and filed in the office of the clerk of the court of common pleas, and the commissioners may, by order of the court, add to said list, or enter on a supplementary list, the names of persons, their occupations, place of business, and place of residence, who shall thereafter be discovered to be qualified to serve as jurors.

In the selection of the names of said compiled list, unless otherwise ordered by the court, the commissioners shall proceed to assign a consecutive number to each name upon said list of electors, starting with one, and shall use, for the purpose of compiling said

> list of prospective jurors, a key number which shall be designated by the court. Said commissioners shall proceed to select from said list of electors the name of each person accordingly as the key number so designated, or the muliples thereof, appear opposite said names on said list, until a sufficient number of such names are selected to make up the required number of prospective jurors.
>
> Automation data processing procedures and visual display apparatus may be utilized in the selection of the names for said compiled list, and in the actual compilation of the list.

STATEMENT

Petitioner was convicted by a jury trial by the Clark County, Ohio Court of Common Pleas of both aggravated murder and aggravated robbery. The indictment contained a specification under the charge that the murder was committed while petitioner was in the commission of an aggravated robbery, and the jury so found.

Thereafter, based upon a report of a single brief psychiatric evaluation session and a presentence investigation report, the trial court found none of the three mitigating factors enumerated in Ohio Rev. Code §2929.04 (B) to exist.

Petitioner was sentenced to death in the electric chair.

He was sentenced "further to imprisonment from six to twenty-five years on the aggravated robbery conviction should the death sentence be modified by another court." 48 Ohio St. 2d at 113.

The Ohio Supreme Court, in its per curiam opinion, noted that, "Although appellant makes no assertion that the evidence adduced was insufficient in law to support the jury's verdicts, we have reviewed the record since this is a capital case." 48 Ohio St. 2d at 114.

That Court tersely summarized the evidence as follows:

> "[O]n the night of January 8, 1974, Roger L. Strodes [petitioner] met with an accomplice to plan a robbery; that Strodes had borrowed a gun earlier that evening; and that after driving around, both men entered Baker's Sundries in Springfield, and Strodes announced a robbery. The deceased, Dwight Baker, was later found in the store with numerous bullet wounds in the head and chest. Witnesses for the state included the accomplice, the lender of the gun, a girl shopping in the store, and a boy who was across the street. Strodes relied on the defense of alibi and presented several witnesses." Id. at 113-14.

Petitioner's death sentence was finally affirmed by the Ohio Supreme Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND RECITED BELOW

In general, the petitioner was indicted, tried, convicted and sentenced to death, and such judgment and sentence were finally affirmed by the Ohio Supreme Court, in violation of his rights under the Sixth, Eighth, Tenth and Fourteenth Amendments to the United States Constitution. These federal questions were raised, at the earliest possible time, at trial in the Court of Common Pleas of Clark County, Ohio, by pleadings (motions to dismiss and strike directed to the indictment, etc.), by objections and exceptions to the evidence (during voir dire and trial), by requests to charge (especially as to lesser included offenses), and objections and exceptions thereto, and by motions, objection and exceptions to the substantive and procedural constitutionality of the mitigation hearings and evidence. These claims as to the federal questions were also raised and pressed consistently in the assignments of errors to the Court of Appeals for Clark County, Ohio, and in the propositions of law proposed to the Ohio Supreme Court.

The manner in which the state courts below passed upon the federal questions is reflected in the attached opinions.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONSTITUTIONAL VALIDITY OF PETITIONER'S SENTENCE OF DEATH.

A.

Introduction

This capital case should be reversed, because petitioner was unconstitutionally charged, tried and convicted.

Ohio's scheme of imposition of capital punishment simply cannot stand scrutiny.

The Ohio laws plainly dictate that a convicted murdered be executed unless he proves one of three mitigating circumstances. Cf., Mullaney v. Wilbur, 421 U.S. 684 (1974).

This is not fair, just or constitutional. Id.

The Ohio laws cannot be upheld where (as here) they are susceptible to arbitrary, capricious and freakish application. Gregg v. Georgia, 96 S. Ct. 2909; Furman v. Georgia, 408 U.S. 238 (1972). The gravamen of this case is whether a human being should be put to death on the basis of his Intelligence Quotient ("I.Q.").

A cursory reading of the preceding Ohio Statutes readily discloses that the only realistic exculpation from the ultimate penalty is being an embicile, psychotic or a moron.

In short, the Ohio death penalty escapes are illusory.

B.

The Ohio Death Penalty Statutes Place Unconstitutional Limitations Upon the Consideration of Mitigating Circumstances.

Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v.

(continued Page 9).

Louisiana, 428 U.S. 325 (1976), hold that contemporary standards of decency, incorporated in the Eighth Amendment, require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" and forbid "treat [ing] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Moreover, they acknowledge that post-Furman legislative enactments of statutes allowing automatic application of the death penalty reflect "attempts by the States to retain the death penalty in a form consistent with the Constitution," rather than "a renewed societal acceptance" of Draconian infliction of capital punishment. Id. at 5273.

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in Woodson and Roberts, are more rigid than contemporary standards of decency can condone, and reflective, not of the will of the people of the State of Ohio as expressed through its legislature, but of a compromise between humane policy concerns and the supposed requirements of Furman.

In the wake of Furman, 21 of the 35 states that enacted new death sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct. 1/ These states responded to the judgment of respected legal scholars that only the removal of all sentencing discretion would satisfy the Furman requirement that death sentences not be arbitrarily imposed. However, the federal government and 11 states enacted statutes following the example of the Model Penal Code Proposed Official Draft of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining

---

1/ 11 Del. Code §§636, 4209(1); Idaho Code §§18-4003 and 4004; Ind. Ann Stat. §10-3041(b); Ky. Crim. Code, Sec. 5 76(2) and 61 (2); La. Rev. Stat. Ann. §§14:30, 14:113 and 14:44; Md. Code Ann. Art. 27, §413; Miss. Code §§97-3-65, 97-3-21 and 97-3-19(2); Vernon's Mo. Stat. Ann. §§559.009(3) and 559.05; Nev. Rev. Stat. §200-030 (5); N.H. Rev. Stat. Ann. §630:1; N.M. Stat. Ann. §40A-2-1, 40A-20-2; N.C. Gen. Stat. §§14-17 and 14-21; Okla. Stat. Tit. 21, §701.3; R.I. Gen. Laws Ann. §11-23-2; S.C. Code §16-52; Tenn. Code Ann. §§39-3702 and 39-2402; Va. Code §18.2-31; Wash. Rev. Code 9.48.030, Initiative Measure No. 316

sentence in a capital case.[2] These twelve jurisdictions, finding the mandatory scheme too harsh, and anticipating that the United States Supreme Court would approve capital sentencing discretion if that discretion were guided by standards, chose to focus sentencing deliberations upon a broad range of mitigating factors.[3]

2/ See, Model Penal Code §201.6 (Proposed Offical Draft, 1962).

3/ In Arizona, Georgia, Illinois, Montana and Utah, any factor deemed mitigating by the sentencing authority could be considered, and could preclude imposition of a capital sentence. Ariz. Rev. Stat. §13-454(D); Ga. Code §27-2531.1(b); Ill. Rev. Stat. ch. 38, §1005-8-1A (subsequently invalidated); Mont. Rev. Codes Ann. §94-5-105(1); Utah Code Ann. §76-5-202(1)(g). And the mitigating factors considered in the sentencing process in these twelve jursidictions invariably include, as they must, in light of the Woodson and Roberts holdings, factors having to do with "the character and record" of the defendant whose life is at stake. Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Thus, in Alabama, Arkansas, Colorado, Connecticut, Florida, Nebraska, Utah and in Federal jurisdictions, the age of the defendant must be considered, and in Colorado and Connecticut and under Federal law a finding that the defendant was under eighteen is an absolute bar to imposition of a death sentence. Ala. H.B. 212 §7(g); Ark. Code §41-4712(d); Sec. (5)(a), Col. S.B. No. 46 (1974 sess.); Conn. Gen. Stat. §53a-45(4) (f); Fla. Stat. Ann. §921.141(7); Neb. Rev. Stat. §29-2523(2); Utah Code Ann. §76-3-207 (1)(e); 49 U.S.C. 1473(c)(6)(A). See also Cal. Penal §190.3; N.M. Stat. Ann. §40a-20-2; NY Penal Law §125.27. In all twelve jurisdictions, the prior criminal record of the defendant must be considered. Ala. H.B. 212 §§(6)(a) and (b); Ariz. Rev. Stat. §§13-454 (1) and (2); Ark. §§41-4711 (a) and (b); Sec. 4 (6) (a), Col. S.B. No. 46; Conn. Gen. Stat. §§53a-45(g) (1) and (2); Fla. Stat. Ann. §§921.141(6) (a) and (b) and (7) and (a); Ga. Code §27-2534.1(b) (1); Ill. Rev. Stat. ch. 38, 1005-8-1A(3); Mont. Rev. Codes Ann. §94-5-105(1) (b); Neb. Rev. Stat. §§29-2523(1) (a) and (2) (a); Utah Code Ann. §76-5-201(1) (a) and (g) and §76-3-207 (1) (a); 49 U.S.C. §1473 (c) (7) (B) (i) and (ii). In Alabama, Arkansas, Florida and Nebraska, a broad range of mental and emotional disturbance may be considered mitigating. Ala. H.B. 212 §7(b); Ark. Code §41-4712(a); Fla. Stat. Ann. §921.141 (7) (b); Neb. Rev. Stat. §§92-2523 (2) (b) and (c). And limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating in Alabama, Arizona, Arkansas, Connecticut, Florida and Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado. Ala. H.B. 212 §7(f); Ariz. Rev. Stat. §13-454(F) (1); Ark. Code §41-4712(c); Sec. 4 (4) (b), Col. S.B. No. 46; Conn. Gen. Stat. §53a-45(f) (2); Fla. Stat. Ann §921. 141 (7) (f); Neb. Rev. Stat. §29-2523(2) (g); 49 U.S.C. §1473 (c)(6) (B).

At the time of the Furman decision, a statute containing mitigating circumstances of the kind contained in the Model Penal Code had passed the Ohio House of Representatives and was pending before the Senate Judiciary Committee. 4/ In light of Furman, the Senate Committee felt it necessary to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and jury as much discretion as possible in the punishment determination procedure." 5/ Sentencing determinations in capital cases were therefore taken from the jury and all mitigating factors having to do with the character and background of the offender were eliminated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency... ."

Ohio Rev. Code §2929.04(B) (3). 6/ In view of the extreme improbability that a psychotic offender would be found criminally responsible, the utility of this circumstance as a means to open the door to consideration of the life

---

4/ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code. 23 CLEV. ST. L. REV. 8, 18 (1974).

5/ Id. at 20.

6/ The statute provides that the trial judge, or if trial is without a jury, a panel of judges, Ohio Rev. Code §2929.03 (c), must impose a death penalty unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of evidence:

> "(1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under stress, coercion, of strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Ohio Rev. Code §2929.04(B).

and character of the accused turns, in practice, upon the scope of the term "mental deficiency." This term is, as a matter of general and psychiatric usage, synonomous with mental retardation, and the Supreme Court of Ohio has held that its meaning is not significantly broader in the context of §2929.04. State v. Bayless 48 Ohio St. 2d 73, 94-96, (1976).[7] Thus -- under a sentencing scheme designed "to remove ... as much discretion as possible in the punishment determination procedure,[8] -- virtually every person who is not mentally retarded and who is convicted of a capital crime becomes part of "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death"[9] solely on the basis of the circumstances of a single criminal act and without independent consideration of any mitigating aspect of his life and character.

7/ That Court noted that:

> "[m]ental deficiency is consistently defined to mean a low or defective state of intelligence,"

id. and deemed itself:

> "...unable to find that the decision of the General Assembly to allow mitigation of sentence for those who are mentally deficient, but not of other mental disorders not constituting psychosis or amounting to insanity, falls outside the proper scope of its authority to assign responsibility and punishment for criminal offenses,"

id. Surprisingly, it has said that age is a "primary" factor going to mental deficiency, State. v. Bell, 48 Ohio St. 2d 270 (1977). But it has invariably upheld death sentences imposed against minors. State v. Bell, supra. (defendant 17 at time of arrest).

In State v. Royster, 48 Ohio St. 2d 381 (1976), it upheld, against a claim that the evidence required a finding of mental deficiency, a death sentence imposed upon a defendant who "had an I.Q. of 75 in 1962; 61 in 1966; and 54 in 1968," id. at 389.

8/ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV. ST. L. REV. 8, 20-21 (1974).

9/ Woodson v. North Carolina, supra.

This Court's recognition that, under contemporary standards of morality, not " ' every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender,'" and that "' individual culpability is not always measured by the category of crime committed'" 10/ is confirmed by the record of capital legislation enacted since its pronouncement that focused, discretionary capital sentencing processes are not in necessary conflict with Eighth Amendment prohobitions. For, legislatures free of misconceptions engendered by the Furman opinions have sometimes allowed consideration of any circumstance deemed mitigating by the sentencer, and have in no case defined mitigating factors as restrictively as did the Ohio legislature.

By contrast, the Ohio legislation not only precludes, for the non-retarded, consideration of any mitigating factor not inhering in the facts of the crime, but precludes consideration of most mitigating aspects of the crime itself, allowing mercy only in the rare cases in which duress or victim inducement is present but does not constitute a defense.

10/ Roberts v. Louisiana, supra.

Ohio's appellate review system[14/] cries for evaluation by this court in light of the "fundamental respect for humanity underlying the Eighth Amendment ... that requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," Woodson v. North Carolina, supra, 428 U.S. 280 (1976).

14/ Although the Ohio Supreme Court has said that mitigating circumstance provisions must "be liberally construed in favor of the accused," State v. Bell, 48 Ohio St. 2d 270, 281 (1976), it has also held that it "will not retry issues of fact" going to sentence determination, but will only determine "whether there is sufficient substantial evidence to support the verdict;" State v. Edwards, 49 Ohio St. 2d 31, 47 (1976) and has upheld a finding of an absence of duress or mental defiency, and the resultant death sentence, in the case of a sixteen year old accomplice of an adult triggerman where "[t]here was evidence in the psychiatric reports that...[he] was perhaps easily led by...[the triggerman]" and evidence of "an unsatisfactory home, absence of family or other supervision, drug involvement, and an inability to cope with school demands," State v. Bell, supra, 48 Ohio St. 2d at 282.

The Ohio Supreme Court has reviewed about 20 post-Furman death sentences. It has reduced none.

An intermediate Ohio Appellate court has vacated the death sentences of two co-defendants after finding:

> "that the undisputed evidence demonstrates that the victim's willingness to buy a large sum of marijuana 'facilitated' the robbery...[and that] the victim's decision to participate in such unlawful while [conspicuously] armed ... 'induced' (i.e. persuaded) the offenders ... in the use of firearms that resulted in the victim's death."

State v. Hines, Ct. of Appeals, Fifth App. Dist., Case Nos. CA-634-639. Before vacating the sentence, the court deemed it necessary to find, in addition, that

> "no basis exists (considering the nature and circumstances of the offense and the history, character and condition of ... [the offenders]) to negate the existence ... of mitigating ...."

Id. at 57.

C.

The Ohio Death Penalty Statutes Violate the Sixth, Eighth and Fourteenth Amendments in that they Deny the Capitally Accused the Right to a Judgment of his Peers as to the Existence of Mitigating Circumstances, and the Appropriateness of the Penalty of Death.

In view of the "awesome finality of a capital case, [15] American jurisdictions had, prior to the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), determined with near unanimity that "infliction of the death penalty" be put in the hands of the jury, rather than the judge." [16] Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction had at some time authorized jury sentencing in capital cases." McGautha v. California, supra, 402 U.S. at 200, n. 11.

> "The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first states to abandon mandatory death sentences in favor of discretionary death penalty statutes. This flexibility remedied the harshness of mandatory statutes by permitting the jury to resond to mitigating factors by withholding the death penalty. By the turn of the century, 23 states and the Federal Government had made death sentences discretionary for first-degree murder and other capital offenses. During the next two decades 14 additional states replaced their mandatory death penalty statutes. Thus, by the end of World War I, all but eight states, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1973, all of

---

15 / McElroy v. United States, 361 U.S. 249, 255 (1960) (dissenting and concurring opinion of Mr. Justice Harlan).

16 / Ibid.

> these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury 17/ sentencing." 18/

In Ohio, the shift to jury discretion in capital sentencing came in 1898, 19/ and the system prevailed without interruption until the death penalty statutes of that state were invalidated in 1972. There is no doubt that the subsequent determination to strip the jury of its control over the use of the death penalty reflects the desire of the Legislature to "retain the death penalty in a form consistent with the [Federal] constitution" 20/ rather than a willing abandonment of the principle that the momentus decision to take or spare the life of a criminal defendant can only be made by a jury of his peers. For the new Ohio Criminal Code as drafted before the decision of this Court in Furman v. Georgia clearly provided for jury sentencing in capital cases. 21/ But, faced with the Furman ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited and the opinion expressed in McGautha that the

---

17/ In 1965, the State of Colorado placed discretionary authority to determine sentence in capital murder sentences solely in the hands of the trial judge. It was the only jurisdiction to do so after the national shift to jury discretion or abolition and before Furman. BOWERS, EXECUTIONS IN AMERICA 8 (1974).

18/ Woodson v. North Carolina, supra.

19/ BOWERS EXECUTIONS IN AMERICA 8 (1974).

20/ Woodson v. North Carolina, supra.

21/ Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV. ST. L. REV. 8, 16-17 (1974).

formulation of standards to guide juries in the capital sentencing process was impossible, the Ohio legislature undoubtedly thought it necessary to make capital sentencing a matter for judicial determination. [22]

It is now conceded that "McGautha's assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience," Gregg v. Georgia, supra. This court has reaffirmed [23] the desirability of jury input in the capital sentencing process, Id. Proffitt v. Florida, supra, and struck down the death penalty laws of three states for their failure to provide a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." Roberts v. Louisiana, supra. And, while this Court has "never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, supra, it has neither considered or approved a post-Furman death penalty statute which excluded the jury from the process of determining sentence. [24] Indeed, in upholding the Florida, post-Furman

---

22 / Id. at 20.

23 / See, Witherspoon v. Illinois, 391 U.S. 510, 390, 391 n. 15, McGautha v. California, supra, at 200 n. 11, 211.

24 / The Court's speculation that "judicial sentencing would lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases," must, of course, be taken in the context in which it was issued -- as a statement of the probable result of a system in which an advisory jury sentence may be mitigated at the discretion of the trial judge and may only be increased where a life sentence would be clearly unreasonable. Even so, it seems to ignore the well documented fact that sentencing attitudes and practices differ widely among

death penalty statute, this Court has approved only the most limited encroachment upon the tradition that only a jury may impose a sentence of death.

> "The jury's [sentencing] verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.'"

Proffitt v. Florida, supra.

Although it may be permissible — and desirable -- to permit trial judges to reduce death sentences imposed uner the influence of passion or prejudice or against the weight of aggravating and mitigating evidence, the imposition of a death penalty under a procedure which affords no opportunity for meaningful jury input -- a practice introduced to contemporary jurisprudence as a result of confusion engendered by Furman and McGautha -- encroaches three independent constitutional principles, and, therefore merits review by this Court.

---

24 / Continued

judges, see, e.g. Zumwatt, The Anarchy of Sentencing in the Federal Courts, 57 J. AM. JUD. SOC. 96 (1973); HOGARTH, SENTENCING AS A HUMAN PROCESS (1971). The capriciousness of having life or death turn upon the disposition of the judge by whom a particular case is decided is manifest. Moreover, detailed, scientific review has revealed no greater consistency in judicial, capital sentencing, although juries were found to be slightly more lenient. KALVEN & ZEISEL, THE AMERICAN JURY, 437-44 (1966).

1. The Principle that Death Sentences may only be imposed by a Jury is Fundamental to our Jurisprudence and an Essential Assurance Against Disproportionality and Excessiveness in Capital Sentencing.

"The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of civilized society." Marion v. Beto, 434 F. 2d 29, 32 (C.A. 5, 1970). We have traced a history which strongly suggests that jury participation in such a decision represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 104 (1934). 25/

Although the legislative trend away from judicial imposition of the death penalty was in part a response to the problem of jury nullification, it was mandated by the enormity of the issue in the context of contemporary standards of morality, McElroy v. United States, supra, 361 U.S. at 255. Legislators across the nation determined, as did Congress, to "take from the judge the onus of inflicting capital punishment," United States v. Jackson, 390 U.S. 570, 576, n. 12, because, in the matter of life and death, as in matters of fact going to the question of guilt or innocence,

> "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The capital defendant was thereby assured that his fate might be determined by a body representative

---

25/ See, Bloom v. Illinois, 391 U.S. 194, 202-07 (1968) in which the Court relied upon a comparable historic pattern to impose constitutional limitations upon "the power of judges to try contempts," id. at 207.

of the full range of social strata and interests rather than by a judge who is trained and bound to uphold the law and may well give less weight to mitigating evidence out of a reluctance to deprive the citizenry of any protection or retribution. Since Judges do impose the death penalty "somewhat more often" than do juries, KALVEN AND ZEISEL, THE AMERICAN JURY 435 (1966), this right can be, in any given case, the right to life.

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) at 64. See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) at 21-40.

Moreover, the policy of placing the decision to take or spare life in the hands of the representatives of the people whom the law stands to protect, and whose retributive sentiments the law serves to counsel, serves "to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, 391 U.S. 510, 520 n. 15. When life is at stake, jury sentencing "'places the real direction of society in the hands of the governed ... and not in ... the government,'" Powell, Jury Trial of Crimes, 23 WASH. & LEE L. REV. 1, 5, citing 1 DE TOCHQUEVILLE, DEMOCRACY IN AMERICA 282 (Reeve Transl. 1948) (1966).

Jury determinations are one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society." Woodson v. North Carolina, supra, [26] At a time when society has rejected "the belief that 'every offense in a like legal category calls for an idential punishment without regard to the past life on habits of a particular offender, '" [27] it is the only precise indicator of those standards. For, while it is possible that over the years patterns of jury nullification and legislative enactment may reveal popular revulsion against imposition of the death penalty in subtle categories of cases, the Eight Amendment surely forbids the execution of defendants whom juries might have spared had the will of the people been made directly known through jury sentencing. The unnecessary institutionalization of a sentencing system which thwarts the merciful sentiments of the people while these subtle distinctions are identified and acted upon by courts and legislatures can only result in unnecessary and unpopular use of the most drastic sanction which the government can impose upon its citizens.

> "In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was commited." [28]

That voice must be heard on the question whether life is to be taken in its behalf.

---

26 / "The jury ... is a significant and reliable objective index of contemporary values because it is so directly involved." Gregg v. Georgia, supra.

27 / Roberts v. Louisiana, supra, 428 U.S. at ____.

28 / Williams v. New York, 337 U.S. 241, 253 (1949) (dissenting opinion of Justice Murphy).

2. The Failure to Provide for Jury Input in the Capital Sentencing Process will result in Impermissably Arbitrary Imposition or the Penalty of Death.

Mandatory death penalty provisions, which "withdr[ew] all sentencing discretion from juries in capital cases," failed "to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences," Woodson v. North Carolina, supra. This is because, in view of the fact "that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes ... it is only reasonble to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict ...

> Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman by resting the penalty determination on the particular jury's willingness to act lawlessly."

Ibid. This argument is equally compelling where aggravating circumstances are built into the definitions of capital crimes, Roberts v. Louisiana, supra, so long as the punishment determination is out of the hands of the jury, it is no less compelling where a death sentence may be imposed upon a judicial finding of the absence of mitigating factors. For,

> "... there is a point at which the wide-spread imposition of drastically severe penalties arouses in ordinary men a sympathy for those accused of crime which leads them to refuse to particpate in their infliction, as complainants, as witnesses, as jurors, and even as officials. When this result occurs, nullification ensues and the effect of severity of threatened ... punishment is greatly to increase its actual uncertainty as well as to provide a general hatred of the law which must culminate ultimately in its change."

Michael & Wechsler, A Rationale of the Law of Homicide II, 37 COLUM. L. REV. 1261, 1265 (1937). And

> "If the matter is consigned to the discretion of some other administrator, such as the judge, the danger of nullification by the jury remains, though it may be smaller than if an offensive penalty is legislatively prescribed. Whether or not that is so will depend upon the jury's guess as to what the judge is likely to do in the event of conviction."

Id. at 1267, n. 19. The addition of a new uncertainty in the processes of trial, appeal and executive review of death sentences can not minimize the incidence of nullification sufficiently to meet the concerns articulated in Furman, Woodson and Roberts.

3. Findings Regarding the Presence or Absence of Mitigating Circumstances are Findings of Fact as to which a Defendant has a Sixth Amendment Right to a Trial by Jury.

The determination made by judges pursuant to §2929.04(B), is a substantially different determination than that typically made by judges in the process of criminal sentencing. For, as we have pointed out above, there can be no weighing of aggravating and mitigating circumstances, no consideration of whether the defendant before the court may or may not be rehabilitated, [29/] no independent evaluation of "the character and record of the individual offender," Roberts v. Louisiana. The §2929.04(B) proceeding consists of three factual determinations of the kind that juries

---

29/ Compare, Vernon's Tex. Code of Crim. Proc., Art. 37.071.

were designed to make, have traditionally made, and must, if the right to trial by jury is to be safeguarded, be permitted to make. The determinations whether "the victim of the offense induced or facilitated it," and whether "it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation" are indistinguishable in kind from the determination that the defendant was "under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force" and thus guilty of the lesser offense of voluntary manslaughter. 30/ And the determination whether "the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity" is surely no different in kind than the determination whether the defense of insanity was in fact established.

A factual determination which separates those who will live and those who will die by the hand of the state is a determination so significant that the prodecural safeguards surrounding its adjudication may not depend upon the form in which the distinction is articulated, for "the criminal law ... is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability," Mullaney v. Wilbur, 321 U.S. 684 (1975). In drawing a distinction between "those who kill in the heat of passion and those who kill in the absence of ... [that] factor" without requiring that the prosecution prove the absence of

---

30/ Ohio Rev. Code Ann. §2903.03

EDITOR'S NOTE

Pages 25 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

overriding passion beyond a reasonable doubt, the State of Maine impermissably denigrated the principle that criminal conviction may only be obtained by proof beyond a reasonable doubt of every element of the alleged crime." Id. at 698. Since the State of Ohio has drawn a distinction between those who kill under statutorily defined mitigating circumstances -- two of which bear remarkable similarity to the determination at issue in Mullaney -- and those who kill in the absence of such circumstances, and has determined that the death penalty is only applicable in the latter category of cases, it cannot constitutionally evade the equally important principle that the criminal defendant is entitled to a judgment of his peers as to facts that significantly affect the degree of his culpability. This is not to say that all factors affecting criminal sentencing determinations must be decided by a jury, 31/ but Mullaney stands for the proposition that where the determination of certain factors is of crucial significance — where it "may be of greater importance than the difference between guilt or innocence for many lesser crimes" — the state may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment." Ibid. Surely, the distinction between crimes punishable by death and those punishable by life imprisonment is of crucial significance. For "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, it is finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, supra.

31/ See note 33, infra.

Judge Friendly held in United States v. Kramer, 289 F. 2d 909 (C.A. 2, 1961) that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences, [32] it must be assumed that "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge. [33] Id. at 912. [34] This principle is no less valid in the case of mitigating factors of identical import.

---

32 / The aggravating circumstance involved in Kramer (the fact that embezzled commercial paper exceed $100 in value) increased the crime from a misdemeanor to a felony. Id. at 920.

33 / The District of Columbia Circuit has held to the contrary regarding the relatively straighforward question of whether the defendant has been convicted triggers the operation of recidivist provisions. Jackson v. United States, 221 F. 2d 883 (C.A.D.C., 1955); Anderson v. United States, 326 A. 2d 807 (C.A.D.C., 1974); but see, United States v. Bolden, 514 F. 2d 1301 (C.A.D.C., 1975). We do not challenge the reasoning of these cases insofar as they relate to the right to have a jury perform the essentially ministerial function of determining whether a defendant has been convicted of prior felonies. But the complex, judgmental questions articulated by §2929.04(B) separate those who may live and those who may die. In such a determination the right to a jury may not be denied.

34 / The Kramer principle "is now well recognized." United States v. DeVall, 462 F. 2d 137, 142 (C.A. 5, 1972). See, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, §20.04, cited in United States v. Ditata, 469 F. 2d 1270, 1273, n. 3 (C.A. 7, 1973):

> "The Government must prove the value of the property stolen because the law provides a greater penalty if the value of the property exceeds $100. ... The value of the property stolen is a question of fact to be determined by the jury."

D.

Ohio Capital Sentencing Procedures Impermissably Penalize Exercise of the Right to Trial by Jury.

United States v. Jackson, 390 U.S. 570 (1968) stands for the proposition that the right to a jury trial is unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which the right is waived. See also, Funicello v. New Jersey, 403 U.S. 948 (1911) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). This is so because such a scheme "needlessly encourages" the waiver of the right to have one's guilt determined by a jury. Id. at 583. Yet, under Ohio capital sentencing procedures the defendant who elects to be tried by a jury must forego the benefit of having his fate determined by a panel of judges rather than by a single judge. This benefit is, of course, considerable:

> "A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities."

Rainsburger v. Foglaine, 380 F. 2d 783, 785 (C.A. 9, 1967). And, since there is no justification for conferring the benefit upon some, but not all capital defendants, it can not legitimately serve as an inducement to forego trial by a jury of one's peers.

E.

Ohio Capital Sentencing Procedures Impermissibly Shift to the Defendant Convicted of Aggravated Murder with Specifications the Burden of Proving Facts which Distinguish Those Who May Live and Those Who Must Die.

The existence of mitigating factors, under Ohio Law, must be established by the defendant and by a preponderance of the evidence. Ohio

Rev. Code Ann. §2929.04(B) (1974). State v. Royster, supra, 48 Ohio St. 2d at 389.

As previously discussed, the nature of the inquiry conducted at the mitigation phase of an Ohio capital trial and established that it is a proceeding at which narrow factual determinations are made about the psychological makeup of the defendant and the precise nature of his crime. We have pointed out that it is upon the basis of these factual determinations that defendants are categorized as being punishable by life imprisonment or condemned to die at the hand of the State. If a distinction of this kind is to be drawn, the State must "require the prosecution to establish beyond a reasonable doubt the fact[s] upon which it turns, "Mullaney v. Wilbur, supra.

> "'[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Gardner v. Florida, citing Woodson v. North Carolina, supra, (concurring opinion of Mr. Justice White) (Emphasis by Mr. Justice White). It follows that Strict adherence to the Due Process requirements set forth in Mullaney is compelled in the context of a mitigation hearing of the kind which the State of Ohio has devised, for

> "There is always in litigation a margin of error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value ... this margin of error is reduced as to him by the process of placing on the other party the burden [of proof] ... beyond a reasonable doubt."

Speiser v. Randall, 357 U.S. 513, 525-526 (1958).

It can not be denied that the capital defendant "has at stake an interest of transcending value." And it can not be contended that the capital defendant is comparably protected by the concession that proof of the facts that would spare his life need only be "established by a preponderance of the evidence," Ohio Rev. Code Ann. §2929.04(B) (1974). For, by that standard he must die even if it is as likely as not that he is, by the calculus of the statute, deserving of mercy.

In view of the gravity of the sentence, and in view of the need of courts and legislatures across the nation to know more precisely what the Eighth Amendment requires of "the procedure employed by the State to select persons for the unique andirreversible penalty of death," [35] it is incumbent upon this Court to consider the rigidity of Ohio capital sentencing process, its isolation from "the conscience of the community," [36] its chilling effect upon the right to trial by jury; its allocation of the burden of proving facts mandating execution and the combined prejudicial effect of these factors upon the defendant accused of a capital crime. In view of the obvious cruelty of the sentence, Furman v. Georgia, supra, (concurring opinion of Mr. Justice White,) it is incumbent upon this Court to consider whether it may be imposed upon one whose capability does not exceed that of this petitioner.

---

35 / Gregg v. Georgia, supra,

36 / Id.

II. PETITIONER SHOULD NOT BE PUT TO DEATH WITHOUT THE VOTE OF THE PEOPLE OF OHIO.

The Eighth Amendment to the Constitution of the United States forbids "cruel and unusual punishments."

The Tenth Amendment to the Constitution of the United States guarantees that:

"The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States, or to the people." (Emphasis supplied.)

The people should exercise the power as to whether petitioner should die.

If not by plebescite, at least, a jury of the people should decide his fate.

See, propositions I.C. through E., supra.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RIGHTS OR PETITIONER, WHO IS BLACK, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, TO A FAIR TRIAL BY AN IMPARTIAL JURY WERE DENIED BY A VENIRE SELECTION PROCESS, VIOLATIVE OF OHIO LAW, WHICH YIELDED ONLY ONE THIRD OF THE PERCENTAGE OF BLACKS IN HIS COUNTY'S GENERAL POPULATION, PETITIONER HAVING DEMONSTRATED A PRIMA FACIE CASE OF INTENTIONAL DISCRIMINATION WHICH THE STATE FAILED TO REBUT BY COMPETENT EVIDENCE, OR ANY AT ALL.

Prior to trial, a special venire of 75 names for prospective jurors for petitioner's trial was drawn, purportedly in compliance with the key number, annual jury list and jury wheel procedures established by Ohio Rev. Code §2313.08 (1974). (See Transcript of "Drawing of Special Venire" of February 27, 1974, hereinafter "D.S.V. Tr.").

However, the testimony of Jury Commissioner Murphy at the hearing established at least the following violations of the Ohio Law: (1) no key number assigned by the Court was used; (2) an arbitrary percentage or weighting was set for each precinct, this figure just being made up by the Commissioners; (3) there were not set rules for the selection of jurors, the method being simply established by the Commissioners themselves; (4) no certified list of electors was furnished, voters lists at the Board of Elections being used instead; and (5) one member of the jury, Kenneth J. Rowlett, had served on a jury the previous year. D.S.V.Tr., pp. 4-14.

The State offered no competent evidence, nor any at all, to rebut this showing; but the trial court overruled petitioner's general objections to the procedure and array. D.S.V.Tr., pp. 14-15; 24.

"Subsequently, on a motion for a new trial on account of newly-discovered evidence, [petitioner] submitted an article published in a local newspaper [results of a two year Clark County docket survey, received in evidence without objection] which concluded that, in Springfield, a disproportionately small number of women, blacks and young persons were called for jury duty. [Petitioner] also offered the 1970 Census [also received without objection] which showed the black population of Springfield

to be 15.53 percent. The percentage of blacks called for [petitioner's venire was one-third of that figure..." 48 Ohio St. 2d at 115. [Editorial insertions supplied.]

Again, the State offered no evidence whatsoever to rebut the prima facie showing of irregularity, impropriety and discrimination in the jury selection process.

Nevertheless, the court below dispatched and dismissed petitioner's challenge to the array and procedure, variously opining that: "The trial court properly overruled the motion for new trial.... No systematic or intentional exclusion was shown by [petitioner]. The trial record indicates that although some formalities were not strictly followed, the selection of the veniremen was made in good faith with no displayed prejudice to [petitioner]... Unless prejudice to the defendant or the systematic and intentional exclusion of a group is shown, we will not reverse a judgment because of minor and technical defects in jury selection procedures." 48 Ohio St. 2d at 115-16.

This rationalization, however, does not comport with this Court's pronouncements of the requirements of equal protection in jury selection, as most recently exemplified by the holding in Castaneda v. Partida, _____ U.S._____, 45 U.S.L.W. 4302,4305 (March 23, 1977), that:

> "Once the defendant has shown substantial under-representation of his group [as by the substantial statistical disparity in relation to census figures in the case at bar], he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." [Editorial insertion supplied.]

Moreover, in the instant case, petitioner's prima facie showing went beyond the requisite showing of statistical disparity to demonstrate at lease five reckless violations of Ohio law in the procedures employed.

As recently observed by this Court in Washington v. Davis, 426 U.S. 229,241 (1976):

> "A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community.....or

> with racially non-neutral selection procedures... With a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' Alexander [v. Louisana, 405 U.S.] at 632."

In petitioner's case, the State not only failed to rebut the many presumptions raised, it did nothing at all, not even examining the jury commissioner or filing any opposition to the motion and supporting evidence for a new trial.

Upon the record, petitioner was irrefutably denied his Sixth and Fourteenth rights to a fair trial by an impartial jury of his peers drawn from a cross-section of his community.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

T.J.V. por W.R.H.

Thomas J. Veskauf
First National Bank Building
Springfield, Ohio 45502
Telephone: (513) 325-7058

and

William R. Holland

William R. Holland
912 Centran Building
Akron, Ohio 44308
Telephone: (216) 535-3371
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 1977, a copy hereof was mailed to James A. Berry, Esq., prosecutor for Clark County, Ohio. I further certify that all parties required to be served have been served.

William R. Holland

William R. Holland

Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76- 76-6783

Roger L. Strodes,

Petitioner

-vs-

The State of Ohio,

Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

Attorney's - Respondent

James [illegible] Berry
Clark County Prosecutor
10 West Columbia Street
Springfield, Ohio 45502

I N D E X

	Page
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Argument	3
Conclusion	18
Appendix	19
1. United States Department of Commerce, Bureau of the census, 1970 census of population, General Population Characteristics, Ohio, Advance Report	19

C I T A T I O N S

Castaneda v. Partida, __U.S.__, 97 S.ct. 1272 (1977)	15
Gilmore v. Utah, __U.S.__, 97 S.ct. 436 (1976)	8
Gregg v. Georgia, __U.S.__, 96 S.ct. 2909 (1976)	4
Hernandez v. Texas, 347 U.S. 475 (1954)	17
Jurek v. Texas, __U.S.__, 96 S.ct. 2950 (1976)	6, 7, 8, 9
Norris v. Alabama, 294 U.S. 587 (1935)	15, 17
Proffitt v. Florida, __U.S.__, 96 S.ct. 2960 (1976)	7, 9
Roberts v. Louisiana, __U.S.__, 96 S.ct. 3001	10
State v. Bayless, 48 Ohio St. 29 73 (1976)	7, 9
State v. Black, 48 Ohio St. 2d 262 (1976)	7

Page

State v. Lockett,
49 Ohio St. 2d 48 (1976)..... 11

State v. Roberts,
48 Ohio St. 2d 221, (1976)..... 9

State v. Strodes,
48 Ohio St. 2d 113 (1976)..... 9

Swain v. Alabama,
380 U.S. 202 (1965)..... 15

Thiel v. Southern P. Co.,
328 U.S. 217 (1946)..... 15

United States v. Jackson,
390 U.S. 570 (1968)..... 11

Woodson v. North Carolina,
__U.S.__, 96 S.ct. 2978 (1976)..... 10

STATUTES AND CONSTITUTIONS

	Page
Georgia Code Section 27-2534.1	8
Ohio Revised Code Section 2313.06	15
Ohio Revised Code Section 2901.22 (A)	6 n.3
Ohio Revised Code Section 2903.01	3
Ohio Revised Code Section 2903.01 (B)	5 n.2
Ohio Revised Code Section 2903.02	3
Ohio Revised Code Section 2929.02	3
Ohio Revised Code Section 2929.03	3
Ohio Revised Code Section 2929.03 (E)	11
Ohio Revised Code Section 2929.04	3, 6 n.4
Ohio Revised Code Section 2929.04 (B) (2)	8 n.5
U.S. Constitution, Amendment VI	13

MISCELLANEOUS

	Page
ABA Standards on Sentencing Alternatives and Procedure, Section 1.1	10
The Common Law, Oliver Wendall Holmes, Jr. 1881, pp. 41-42	5n.1
National Advisory Commission, Courts Section 5.1	10
National Advisory Commission, The Court's Role in Sentencing and Corrections, Section 5.1	10
National Advisory Commission, The Court's Role in Sentencing and Corrections, Section 16.8 (1)..	10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-

Roger L. Strodes,

Petitioner

-vs-

The State of Ohio,

Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

James A. Berry
Prosecuting Attorney of
Clark County
10 West Columbia Street
Springfield, Ohio 45502

CITATION TO OPINION BELOW

The opinion of the Ohio Supreme Court is reported at 48 Ohio St. 2d 113 (1976).

JURISDICTION

Respondent does not have any question as regards the statement of Jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. The respondent has no dispute with petitioner's first question presented.

2. The second question presented this Court is whether the Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury were preserved by the trial court when the venire selection contained a percentage of negroes substantially equal to the percentage of negroes in the population of the county from which the venire was selected.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no authorities in addition to petitioner's.

STATEMENT

At this time respondent has no material dispute with the petitioner's statement of the case.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE CONSTITUTIONALITY OF THE OHIO DEATH PENALTY STATUTES BECAUSE THOSE STATUTES ARE CONSTITUTIONAL ON THEIR FACE.

Effective January 1, 1974, Ohio Revised Code Sections 2903.01 and 2929.02 became effective as the law of Ohio, defining therein the offense of aggravated murder and the penalties to be imposed for a violation of Section 2903.01 of the Ohio Revised Code. Sections 2929.03 and 2929.04, also effective January 1, 1974, delineates the procedure that must be followed before the dealth penalty may be imposed and the criteria that must be established before a defendant can be sentenced to death.

These sections were part of Amended Substitute House Bill 511, a comprehensive revision of Ohio's substantive criminal law. During the revision the Ohio Legislature, if it had wished to do so could have removed the death penalty altogether from the penal code; however, when presented with the best opportunity to take just such action, it chose instead to structure a death penalty scheme that removed caprice and arbitrariness from the imposition of the penalty.

The Ohio Legislature is a political body as much as is every other legislature across the land. And, as such, its pronouncements, as to what the laws

of Ohio are to be, must be considered to be a reflection of the will of the people of Ohio. If the populace of Ohio did not want a death penalty for any crimes, the legislators enacting such a penalty would, it can be assumed, either have been voted from office or have repealed the enactment. On other issues perhaps such a result could not be presumed; however, when one considers the emotional and often debated nature of the capital punishment argument, the result is different.

This Court has said that it will presume to be valid legislation regarding the setting of criminal penalties by democratically elected legislators. Gregg v. Georgia, ____U.S._____, 96 S.ct. 2909, 2926 (1976), although this is not the only criteria for determing whether the people really do want a death penalty.

To sustain the proof that the legislation in question is not a reflection of the contemporary will of the represented the petitioner must present proof of such fact because of the heavy burden he bears in attacking it on the grounds of illegitimacy. Petitioner asserts that the death penalty scheme at issue is a compromise between invalid concerns. He does not address the fact that never has this Court held that the death penalty is unconstitutional per se, nor does he address the fact that distinguished commentators on the law have held to the principle that the community has a valid,

societal need for revenge and retribution.[1]

What petitioner would pejoratively call compromise, respondent would call emendating. The Ohio Senate Committee, to retain a valid death penalty provision eliminated some of the discretion given the judge and jury in a capital case. Such corrective action reflects not compromise, but an attempt to validily fulfill the will of the people for a death penalty. Simplified, petitioner's argument is that whatever the will of the people, it must be followed by the legislature, constitutional or not.

To even reach the consideration of the death penalty a defendant must first be found guilty of aggravated murder, either having purposely, and with prior calculation and design killed another or purposely killing another while committing, attempting to commit, or fleeing immediately after committing any of several serious felonies.[2] The required mental

---

[1]"The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution." Oliver Wendall Holmes, Jr., The Common Law, 1881 pp. 41-42.

[2]These felonies are kidnapping, rape, arson, aggravated arson, aggravated burglary, burglary, robbery, aggravated robbery, or escape, Section 2903.01 (B) Ohio Revised Code.

culpability is "purposely," which is the highest degree of mental culpability established by the legislature.[3]

Next, at least one of the seven aggravating circumstances must have been charged and found to exist by the trier.[4] The finding of the aggravating circumstance can only be on proof beyond a reasonable doubt.

Even then before the trial judge can impose a penalty of death he must require a pre-sentence investigation be made, that a psychiatric examination be made, the court shall also hear testimony and evidence, arguments of counsel, the offender is allowed to make a statement, under oath or not, as he desires. Section 2929.04 Ohio Revised Code.

As the Texas death penalty statutes tested by this Court in Jurek v. Texas, ___U.S.___, 96 S.ct. 2950, 2956 (1976), were held constitutional despite the fact that no specific mitigating circumstances were enumerated in the statute, the Ohio penalty should also pass the test that the trier's "objective consid-

---

[3]Ohio Revised Code Section 2901.22 (A): "A person acts purposely when it is his specific intention to cause a certain result, . . . "

[4]Ohio Revised Code Section 2929.04, they are (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office, (2) murder for hire, (3) murder to escape accountability for another crime, (4) murder by a prisoner, (5) repeat murder or mass murder, (6) killing a law enforcement officer, and (7) felony murder.

eration of the particulatized circumstances of the individual offense and the individual offender before it [ ] impose[s] a sentence of death." Jurek v. Texas, supra at 2957.

If these are not to be considered by the court in sentencing, petitioner offers no reason why they were included as part of the sentencing process, especially when the legislature made the preparation, of reports, or consideration of arguments, imperative upon the court.

At his sentencing hearing petitioner did not participate except to argue its unconstitutionality, primarily because of the methodology of the court-appointed psychiatrist. It would hardly seem proper for petitioner to object at this point to the constitutionality of the sentencing procedure for its being without independent consideration of the circumstances of the conviction and without consideration of mitigating factors in the life and character of the accused.

In State v. Bayless, 48 Ohio St. 2d 73, 86-7 (1976), the Supreme Court of Ohio, in considering the mitigating circumstances as a whole stated:

> [I]t is an essential judicial task to assure that those standards be strictly construed in favor of the defendant, to allow the broadest consideration of mitigating circumstances consistent with their language. We perceive no distinction of constitional dimensions between Ohio's mitigating factors, so construed, and those upheld in Proffitt v. Florida, supra. (footnotes omitted). See also State v. Black, 48 Ohio St. 2d 262, 268 (1976).

The Court should accept the construction by the Ohio courts of Ohio statutes. Jurek v. Texas, supra at 2957, note 7.

The three questions that must be put to the jury in the Texas death penalty statutes are, in slightly different form, in effect in the Ohio scheme.[5] The differences in form makes no differences in effect.

The net effect of the Ohio death sentencing scheme is to objectively consider the particularized circumstances of the individual sentence and the individual offender and thus meets constitutional requirements.

The sentence of death is reviewable as of right in the Supreme Court of Ohio, upon the appeal of the offender. Although such sentence is not automatically reviewed as it would be in Georgia, Georgia Code Section 27-2534.1, mandatory review is not constitutionally required. cf. Gilmore v. Utah, ___U.S.___, 97 S.ct. 436, 439 (1976). What is constitutionally required is that a court with state wide jurisdiction conscientiously review the sentences

---

[5]The first question regards the mental culpability of the accused and is the question an Ohio jury must answer to find the accused guilty of aggravated murder, i.e., "purposely" killing. The second question is part of sentencing, probation, and parole dicisions made daily in every jurisdiction. Finally, the third question, is similar to that that must be answered under Section 2929.04 (B) (2) of the mitigating factors.

for, inter alia, consistency, fairness, and rationality. Proffitt v. Florida, ___U.S.____, 96 S.ct. 2960, 2969-70, (1976); Jurek v. Texas, supra at 2955.

The Ohio Supreme Court set forth its philosophy of review and its declared purpose in reviewing death penalty cases in State v. Bayless, supra, the first death penalty case decided in Ohio under the new code. The court said:

> We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentence are fairly imposed by Ohio's trial judges. at 86.

Although petitioner did not challenge the sufficiency of the evidence in the case against him, the Ohio Supreme Court did review the case in the manner stated in State v. Bayless, State v. Strodes, 48 Ohio St. 2d 113, 114 (1976). The evidence was similarily reviewed in State v. Roberts, 48 Ohio St. 2d 221, 227 (1976).

This Court has never held that only juries can, or even should be the sentencing authority in capital cases. In Proffitt v. Florida, supra, this court approved of judicial sentencing:

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. at 2966 (footnotes omitted)

See also ABA Standards on Sentencing Alternatives and Procedure, Section 1.1 and the National Advisory Commission, Courts Section 5.1, the Court's Role in Sentencing and Corrections, Sections 5.1, the Sentencing Agency and 16.8 (1) Sentencing Alternatives.

Experienced and rational imposition of the death penalty will insure that any arbitrariness and caprice inherent in jury sentencing is removed and that the death penalty is imposed only in a fair and even handed manner.

The findings and reasoning of the trial judge is on the record, a jury's deliberations are not. A jury sentence cannot be reviewed to determine for what reasons it was imposed. A trial judge is better able to separate himself from the emotionalism and sensational aspects that accompany a capital trial, which must by its very definition be the wilful, purposelful killing of another in aggravating circumstances.

Petitioner's citation of Roberts v. Louisiana, ___U.S.___, 96 S.ct 3001 (1976) and Woodson v. North Carolina, ___U.S.___, 96 S.ct. 2978 (1976), are distinguishable because in those instances capital punishment was mandatory upon a finding of guilt of the crime charged, giving consideration to the relevant facets of the character of the accused. Petitioner contends that the Ohio death penalty induces accused to forego trial by jury because he may also be tried by a three judge panel who mus

unanimiously agree on the non-existence of mitigating factors. This contention does not have merit in fact. Petitioner himself must not have thought that the benefit was sufficient to force him to forego his right to jury trial.

Unlike United States v. Jackson, 390 U.S. 570 (1968), cited by petitioner, the Ohio scheme provides for the death penalty under either alternative chosen.

The choice the accused and his counsel have under the Ohio scheme is whether there is a better chance of convincing one of three judges of mitigating factors or one of twelve jurymen of his innocence. The question is one of trial strategy and is not of constitutional import.

Petitioner's argument that Section 2929.03 (E) Ohio Revised Code unconstitutionally requires him to prove by a preponderance of the evidence mitigating factors, misconstrues the function of that section. Arguments urging mitigation of sentence are traditionally put forth by the defense, as guilt has already been proven. As was shown in the argument above, the mitigating factors have been broadly interpreted, and are more than mere affirmative defenses, State v. Lockett, 49 Ohio St. 2d 48, 65-66 (1976).

Petition wantonly killed the owner of a mom and pop store after robbing him. A punishment of death would not be out of proportion to the severity

of the crime. And, Ohio has provided statutes for the imposition of the death penalty that assure in this case that the death penalty was not wantonly or freakishly imposed, but that it was imposed in an evenhanded, rational, and consistent manner; which entence was affirmed after meaningful review. For these reasons, the Ohio death penalty scheme is constitional and certiorari should not issue.

II. THE PEOPLE OF OHIO HAVE RATIFIED THE OHIO DEATH PENALTY THROUGH THEIR LEGISLATORS AND HAVE DELIGATED THE EXERCISE OF THAT POWER OF LIFE AND DEATH OVER PETITIONER TO JURIES AND COURTS THROUGH THOSE SAME LEGISLATORS.

Petitioner's first claim is that only by plebiscite should petitioner be sentenced to death. To carry this argument to its logical conclusion would be to require all criminal sentences to be determined by plebiscite, in order to grant equal benefit of the law to all convicted individuals.

Furthermore, such a national plebiscite would violate petitioner's right to trial in the vicinage, U.S. Constitution, Amendment VI.

Petitioner's second contention is a repeat of some of his earlier arguments. Therefore, the rebuttal to those will not be repeated herein.

III. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN PETITIONER HAS FAILED TO PRESENT A PRIMA FACIE CASE OF SYSTEMATIC OR INTENTIONAL DISCRIMINATION IN THE SELECTION OF JURORS OVER A SIGNIFICANT PERIOD OF TIME; NOR IS THE STATE REQUIRED TO REBUT SUCH ARGUMENTS UNTIL A PRIMA FACIE CASE IS MADE.

Prior to the trial of petitioner a special venire composed of seventy-five names was drawn in the presence of counsel for petitioner and another special venire was similarly drawn for a co-defendant. Counsel for petitioner examined one of the two jury commissioners on the procedure used to fill the jury wheel. At the close of the examination of Mr. Murphy, the jury commissioner, counsel objected generally to the procedure and to the method used to fill the jury wheel, Transcript of Drawing of Special Venire, at 14. Counsel did not at that time indicate that he was objecting on constitutional grounds, nor did he so indicate when he renewed his objection, at 24.

The petition in this case misleads this Court when petitioner asserts at page 32 of his petition that one member of the special venire had served on a jury the previous year, venireman Kenneth J. Rowlett. In fact Mr. Rowlett had only been called as a prospective juror in the proceding year. Counsel for petitioner did not challenge Mr. Rowlett's service on the jury for cause nor was he removed pre-emptorily.

Contrary to petitioner's suggestion, the array of venireman need not reflect an exact cross section of the community. Swain v. Alabama, 380 U.S. 202, 208, (1965). All that is required is that veniremen be selected without systematic and intentional exclusion of any identificable group, Thiel v. Southern P. Co., 328 U.S. 217 (1946).

To substantiate a claim of denial of equal protection based on racial discrimination, the petitioner must first show that he is the member of recognizable, distinct class. Respondent would not dispute that petitioner is a member of such a class - Negro. Petitioner must next show a degree of under-representation of his class over a significant period of time such as would establish a prima facie case of exclusion of his class from the legal processes. Castaneda v. Partida, ___U.S.___, 97 S.ct. 1272 (1972), March 23, 1977. Norris v. Alabama, 294 U.S. 587 (1935).

It is in this regard that petitioner fails. Initially his statistics are for the wrong geographical area. Section 2313.06 (1953) of the Ohio Revised Code requires that the venire list be drawn from the county; therefore, petitioner's late motion for a new trial contains misleading information. This misapplication of statistical information is carried into petitioner's petition at page 32 where he asserts that the special venire process, as applied in the instant case, produced only 5.33 percent of Negroes on the list, or "one third

of the percentage of blacks in his [petitioner's] county's general population."

In fact, the percentage of Negroes in the county, according to the 1970 census figures of the U.S. Department of Commerce, Bureau of Census, is 8.42 percent of the total population. (Appendix p. 19). Of the seventy-five persons selected for the special venire, four were Negroes, 5.33 percent of the venire. Mathematically then, if 6.3 potential jurors had been Negroes, in county population percentage of Negroes would have been exactly represented on the special venire.[1]

A total under-representation of two jurors does not establish a prima facie case of intentional, arbitrary, or systematic exclusion of blacks from the venires of Clark County, Ohio.

---

[1]These figures are presented to this Court for two reasons, First, the petitioner did not himself produce the 1970 census figures before the trial court until January 14, 1975, upon his motion for new trial while his case was on appear to the Court of Appeals, Clark County, Ohio. At that time the figures were not introduced in evidence, but merely were attached, in the form of an affidavit, to his motion. Secondly, to rebut what respondent feels is an innocent, but misleading analysis of the statistics before this court in petitioner's brief caused, respondent believes, by the inadvertant use of the word "county" in place of city in the petition.

Nor does the newspaper article cited by petitioner aid his contentions of denial of equal protection. It was introduced in petitioner's second motion for a new trial by affidavit attached to the motion. There has been no showing of the articles reliability and its contents are not on point.[2]

Petition also fails to show significant under-representation over a significant period of time. He has presented to this Court one instance of under representation, which is by a small percentage. Any conclusions of systematic exclusions drawn from one array selection are inherently suspect in that they do not consider the total selection process, but only one chance drawing from the jury wheel, accord, Hernandez v. Texas, 347 U.S. 475, 480 (1954) and Norris v. Alabama, supra.

Therefore, petitioner has not presented a prima facie case of intentional discrimination which the state must rebut. Nor does this case present any issue of constitutionally prohibited exclusion.

---

[2]Part of the material and assertions in the article were gathered by the reporter from Eugene Nevius, co-counsel below in the instant case, while the case was in the process of appeal.

C O N C L U S I O N

It is respectfully submitted that the petition for writ of certiorari should not be granted.

James A. Berry
Clark County Prosecuting Attorney

PROOF OF SERVICE

I, James A. Berry, Prosecuting Attorney for Clark County, Ohio, and a member of the Bar of the Supreme Court of the United States hereby certify that on the _____ day of June, 1977, I served copies of the foregoing Response in Opposition to Petition for Writ of Certiorari on Thomas J. Veskauf, First National Bank Building, Springfield, Ohio 45502, William R. Hollard, 912 Centran Building, Akron, Ohio 44308, attorneys for petitioner, by mailing copies in duly addressed envelopes, with first class U.S. postage.

James A. Berry
Clark County Prosecuting Attorney
Attorney for Respondent
2 West Columbia Street
Springfield, Ohio 45502

APPENDIX

PERCENTAGE DISTRIBUTION OF THE POPULATION, BY RACE AND BY COUNTY, OHIO, APRIL 1, 1970

County	Total, All Races		White		Black		Other	
	Number	Percentage Of All Races	Number	Percentage Of All Races	Number	Percentage Of All Races	Number	Percentage Of All Races
OHIO TOTAL	10,652,017	100.00%	9,646,997	90.56%	970,477	9.11%	34,543	.32%
Adams	18,957	100.00	18,915	99.78	25	0.13	17	.09
Allen	111,144	100.00	101,639	91.45	9,234	8.31	271	.24
Ashland	43,303	100.00	43,013	99.33	238	0.55	52	.12
Ashtabula	99,237	100.00	95,372	97.08	2,652	2.70	213	.21
Athens	54,889	100.00	53,198	96.92	1,230	2.24	461	.83
Auglaize	38,602	100.00	38,525	99.80	39	0.10	38	.09
Belmont	80,917	100.00	79,087	97.74	1,710	2.11	120	.14
Brown	26,635	100.00	26,108	98.02	509	1.91	18	.06
Butler	226,207	100.00	214,455	94.80	11,171	4.94	581	.25
Carroll	21,579	100.00	21,409	99.21	145	0.67	25	.11
Champaign	30,491	100.00	29,447	96.58	986	3.23	58	.19
Clark	157,115	100.00	143,586	91.39	13,236	8.42	293	.18
Clermont	95,725	100.00	94,665	98.89	896	0.94	164	.17
Clinton	31,464	100.00	30,613	97.30	788	2.50	63	.20
Columbiana	108,310	100.00	106,584	98.41	1,576	1.46	150	.13
Coshocton	33,486	100.00	33,100	98.85	335	1.00	51	.15
Crawford	50,364	100.00	50,003	99.28	264	0.52	97	.19
Cuyahoga	1,721,300	100.00	1,383,749	80.39	328,419	19.08	9,132	.53
Darke	49,141	100.00	48,868	99.44	212	0.43	61	.12
Defiance	36,949	100.00	36,702	99.33	109	0.30	138	.37
Delaware	42,908	100.00	41,604	96.96	1,231	2.87	73	.17
Erie	75,909	100.00	70,536	92.92	5,242	6.91	131	.17
Fairfield	73,301	100.00	72,534	98.95	653	0.89	114	.15
Fayette	25,461	100.00	24,713	97.06	714	2.80	34	.13
Franklin	833,249	100.00	725,171	87.03	104,387	12.53	3,691	.44
Fulton	33,071	100.00	32,904	99.50	43	0.13	124	.37
Gallia	25,239	100.00	24,106	95.51	1,057	4.19	76	.30
Geauga	62,977	100.00	61,951	98.37	673	1.39	153	.24
Greene	125,057	100.00	116,308	93.00	8,241	6.59	508	.40
Guernsey	37,665	100.00	36,917	98.01	700	1.86	48	.12
Hamilton	924,018	100.00	775,663	83.94	145,294	15.72	3,061	.33
Hancock	61,217	100.00	60,745	99.23	339	0.55	133	.21
Hardin	30,813	100.00	30,548	99.14	204	0.66	61	.19
Harrison	17,013	100.00	16,473	96.83	516	3.03	24	.14
Henry	27,058	100.00	26,848	99.22	106	0.39	104	.38
Highland	28,996	100.00	28,213	97.30	729	2.51	54	.18
Hocking	20,322	100.00	20,194	99.37	115	0.57	13	.06
Holmes	23,024	100.00	23,000	99.90	7	0.03	17	.07
Huron	49,587	100.00	48,891	98.60	577	1.16	119	.23
Jackson	27,174	100.00	26,949	99.17	194	0.71	31	.11
Jefferson	96,193	100.00	90,668	94.26	5,333	5.54	192	.19
Knox	41,795	100.00	41,367	98.98	360	0.86	68	.10
Lake	197,200	100.00	193,993	98.37	2,634	1.34	573	.29
Lawrence	56,868	100.00	55,161	97.00	1,622	2.85	85	.14
Licking	107,709	100.00	105,934	98.27	1,660	1.54	200	.18
Logan	35,072	100.00	34,384	98.04	658	1.88	30	.08
Lorain	256,843	100.00	239,252	93.15	16,388	6.38	1,203	.46
Lucas	484,370	100.00	427,541	88.27	54,694	11.29	2,135	.44
Madison	28,318	100.00	26,843	94.79	1,437	5.07	38	.13
Mahoning	303,424	100.00	264,915	87.31	37,217	12.26	982	.32
Marion	56,734	100.00	52,824	97.06	1,753	3.21	147	.22
Medina	82,717	100.00	81,919	99.04	688	0.83	110	.13
Meigs	19,799	100.00	19,549	98.74	223	1.13	27	.13
Mercer	35,265	100.00	35,212	99.85	2	0.01	51	.14
Miami	84,342	100.00	82,550	97.88	1,674	1.98	118	.13
Monroe	15,739	100.00	15,722	99.89	6	0.04	11	.06
Montgomery	606,148	100.00	520,489	85.87	83,672	13.80	1,987	.32
Morgan	12,375	100.00	11,848	95.74	488	3.94	39	.31
Morrow	21,348	100.00	21,327	99.90	7	0.03	14	.06
Muskingum	77,826	100.00	74,406	95.61	3,292	4.23	128	.16
Noble	10,428	100.00	10,412	99.85	6	0.06	10	.09
Ottawa	37,099	100.00	36,661	98.82	263	0.71	175	.47
Paulding	19,329	100.00	18,955	98.07	273	1.41	101	.52
Perry	27,434	100.00	27,282	99.45	125	0.46	27	.09
Pickaway	40,071	100.00	39,233	97.91	783	1.95	55	.13
Pike	19,114	100.00	18,813	98.43	287	1.50	14	.07
Portage	125,868	100.00	122,786	97.55	2,677	2.13	405	.32
Preble	34,719	100.00	34,586	99.62	89	0.26	44	.12
Putnam	31,134	100.00	31,014	99.61	8	0.03	112	.35
Richland	129,997	100.00	121,127	93.18	8,669	6.67	201	.15
Ross	61,211	100.00	58,164	95.02	2,970	4.85	77	.12
Sandusky	60,983	100.00	59,565	97.67	1,023	1.68	395	.64
Scioto	76,951	100.00	75,545	98.17	1,319	1.71	87	.11
Seneca	60,696	100.00	59,467	97.98	1,046	1.72	183	.30
Shelby	37,748	100.00	37,173	98.48	550	1.46	25	.06
Stark	372,210	100.00	349,860	94.00	21,558	5.79	792	.21
Summit	553,371	100.00	500,290	90.41	51,622	9.33	1,459	.26
Trumbull	232,579	100.00	218,883	94.11	13,104	5.63	594	.25
Tuscarawas	77,211	100.00	76,407	98.96	738	0.96	66	.08
Union	23,786	100.00	23,372	98.26	388	1.63	26	.10
Van Wert	29,194	100.00	29,010	99.37	110	0.38	74	.25
Vinton	9,420	100.00	9,393	99.71	19	0.20	8	.08
Warren	84,925	100.00	83,531	98.36	1,285	1.51	109	.12
Washington	57,160	100.00	56,351	98.58	674	1.18	135	.23
Wayne	87,123	100.00	85,592	98.24	1,372	1.57	159	.18
Williams	33,669	100.00	33,607	99.82	5	0.01	57	.16
Wood	89,722	100.00	88,932	99.11	393	0.44	407	.45
Wyandot	21,826	100.00	21,788	99.83	12	0.05	26	.11

Note: Detail may not add to totals due to rounding.

Source: U. S. Department of Commerce, Bureau of the Census, 1970 Census of Population, General Population Characteristics, Ohio, Advance Report, PC(V2)-37, and computations.

BEST COPY AVAILABLE